RECORD AND BRIEFS

SUPREME COURT U.S.
FILED
OCT 10 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STEPHEN F. HENRY
2625 Alcatraz Avenue, No. 615
Berkeley, CA 94705

DANIEL L. GEYSER
Counsel of Record
STRIS & MAHER LLP
Three Energy Square
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(214) 396-6634
daniel.geyser@strismaher.com

PETER K. STRIS
BRENDAN S. MAHER
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

TABLE OF CONTENTS

Page

Statutory provisions involved 1

Statement 3

Summary of argument 17

Argument 21

I. The SEC properly construed Dodd-Frank's anti-retaliation provision to protect internal reporting and its central role in Congress's regulatory scheme 21

A. The anti-retaliation provision's text and structure confirm that Congress did not limit its express protection of internal reporting to those who report externally to the SEC 25

B. The SEC's construction of Subdivision (iii) is necessary to promote and protect Congress's statutory objectives and the overall regulatory scheme 33

C. The legislative history reaffirms that Congress expanded Subdivision (iii) to protect internal reporting 40

II. Petitioner's APA procedural challenges are both meritless and not properly presented 42

A. The Court should not consider petitioner's new procedural challenges 43

B. In any event, petitioner's procedural attacks are meritless 45

C. The SEC's two independent clarifications of Section 78u-6 warrant *Chevron* deference with or without notice-and-comment procedures 51

Conclusion 54

TABLE OF AUTHORITIES

Page

Cases:

Am. Coke & Coal Chems. Institute v. *EPA*, 452 F.3d 930 (D.C. Cir. 2006) 46, 48
Am. Med. Ass'n v. *United States*, 887 F.2d 760 (7th Cir. 1989) 46, 47
Asadi v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) ..... *passim*
Barnhart v. *Walton*, 535 U.S. 212 (2002) 53
Berman v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) ..... *passim*
Bowman Transp., Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 50
Brown v. *Gardner*, 513 U.S. 115 (1994) 26
Bussing v. *COR Clearing, LLC*, 20 F. Supp. 3d 719 (D. Neb. 2014) 28
Cal. Valley Miwork Tribe v. *United States*, 515 F.3d 1262 (D.C. Cir. 2008) 53
Cent. Tex. Tel. Co-op, Inc. v. *FCC*, 402 F.3d 205 (D.C. Cir. 2005) 52
Chaidez v. *United States*, 568 U.S. 342 (2010) 44, 45
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*
Dolan v. *U.S. Postal Serv.*, 546 U.S. 481 (2006) 22
Dole v. *United Steelworkers of Am.*, 494 U.S. 26 (1990) 23
Duncan v. *Walker*, 533 U.S. 167 (2001) 35
Edelman v. *Lynchburg Coll.*, 535 U.S. 106 (2002) 53
Encino Motorcars, LLC v. *Navarro*, 136 S. Ct. 2117 (2016) 45
Envirocare of Utah, Inc. v. *Nuclear Regulatory Comm'n*, 194 F.3d 72 (D.C. Cir. 1999) 51
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 (1949) 23
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 22

Page

Cases—continued:

Fed. Express Corp. v. *Holowecki*,
552 U.S. 389 (2008) 19, 23, 25
General Dynamics Land Sys., Inc. v. *Cline*,
540 U.S. 581 (2004) 27
Global Crossing Telecommc'ns, Inc. v. *Metrophones Telecommc'ns, Inc.*, 550 U.S. 45 (2007) 50
Henson v. *Santander Consumer USA Inc.*,
137 S. Ct. 1718 (2017) 26
Holloway v. *United States*, 526 U.S. 1 (1999) 29
JEM Broadcasting Co. v. *FCC*, 22 F.3d 320
(D.C. Cir. 1994) 45, 46
Johnson v. *Ry. Express Agency, Inc.*,
421 U.S. 454 (1975) 19
Jones v. *SouthPeak Interactive Corp.*, 777 F3d 658
(4th Cir. 2015) 39
King v. *Burwell*, 135 S. Ct. 2480 (2015) 23
Kruse v. *Wells Fargo Home Mortg., Inc.*, 383 F.3d 49
(2d Cir. 2004) 53
Lawson v. *FMR LLC*, 134 S. Ct. 1158 (2014) ..... *passim*
Lawson v. *Suwannee Fruit & Steamship Co.*,
336 U.S. 198 (1949) 24, 25, 26
Long Island Care at Home, Ltd. v. *Coke*,
551 U.S. 158 (2007) 46, 50
McLane Co., Inc. v. *EEOC*, 137 S. Ct. 1159 (2017) 45
Michigan v. *EPA*, 135 S. Ct. 2699 (2015) 21
Miller v. *Cal. Speedway Corp.*, 536 F.3d 1020
(9th Cir. 2008) 52
Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 22
Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 22
Nat'l Mining Ass'n v. *Mine Safety & Health Admin.*, 512 F.3d 696 (D.C. Cir. 2008) 49
Nw. Austin Mun. Util. Dist. No. One v. *Holder*,
557 U.S. 193 (2009) 24, 25, 26

Page

Cases—continued:

Omnipoint Corp. v. *FCC*, 78 F.3d 620 (D.C. Cir. 1996) 47, 50
Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) 52
Perez-Guzman v. *Lynch*, 835 F.3d 1066 (9th Cir. 2016) 45
Philko Aviation, Inc. v. *Shacket*, 462 U.S. 406 (1983) 23
Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 22
S. Terminal Corp. v. *EPA*, 504 F.2d 646 (1st Cir. 1974) 48
S.F. Arts & Athletics, Inc. v. *U.S. Olympic Committee*, 483 U.S. 522 (1987) 44
Sai Kwan Wong v. *Doar*, 571 F.3d 247 (2d Cir. 2009) 45
Schuetz v. *Banc One Mortg. Corp.*, 292 F.3d 1004 (9th Cir. 2002) 53
SEC v. *Zandford*, 535 U.S. 813 (2002) 40
Shalala v. *Guernsey Mem. Hosp.*, 514 U.S. 87 (1995) 52
Shinseki v. *Sanders*, 556 U.S. 396 (2009) 51
Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 25
Stenberg v. *Carhart*, 530 U.S. 914 (2000) 23, 27
Syncor Int'l Corp. v. *Shalala*, 127 F.3d 90 (D.C. Cir. 1997) 52
Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 43
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 37
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 27
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 43
United Steelworkers of Am., AFL-CIO-CLC v. *Schuylkill Metals Corp.*, 828 F.2d 314 (5th Cir. 1987) 46

Page

Cases—continued:

Utility Air Regulatory Group v. *EPA*,
134 S. Ct. 2427 (2014) 24, 26, 27, 34
Warder v. *Shalala*, 149 F.3d 73 (1st Cir. 1998) 52
Wood v. *Allen*, 558 U.S. 290 (2010) 44
Yates v. *United States*, 135 S. Ct. 1074 (2015) 25

Statutes, regulations, and rule:

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 ..... *passim*
12 U.S.C. 5567 32
15 U.S.C. 78u-6(a)(1) 7
15 U.S.C. 78u-6(a)(6) ..... *passim*
15 U.S.C. 78u-6(b)(1) 7, 32
15 U.S.C. 78u-6(h) ..... *passim*
15 U.S.C. 78u-6(h)(1)(A) ..... *passim*
15 U.S.C. 78u-6(h)(1)(A)(i) ..... *passim*
15 U.S.C. 78u-6(h)(1)(A)(ii) ..... *passim*
15 U.S.C. 78u-6(h)(1)(B)(i) 9, 26
15 U.S.C. 78u-6(h)(1)(B)(iii) 9
15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(bb) 26
15 U.S.C. 78u-6(h)(1)(C) 9, 26
15 U.S.C. 78u-6(j) ..... *passim*
15 U.S.C. 78u-7(a) 10, 50
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746 ..... *passim*
15 U.S.C. 7245 ..... 8, 16
15 U.S.C. 7201 2
15 U.S.C. 7245 ..... 8, 16
15 U.S.C. 78j-1(b) 8
15 U.S.C. 78j-1(m) 2, 8
15 U.S.C. 78l 5, 9
15 U.S.C. 78o(d) 5
18 U.S.C. 1514A(a) 5, 9
18 U.S.C. 1514A(a)(1)(A) 5

Page

Statutes, regulation, and rule—continued:
18 U.S.C. 1514A(a)(1)(B) 5
18 U.S.C. 1514A(a)(1)(C) 5, 26
18 U.S.C. 1514A(b)(1)(A) 6
18 U.S.C. 1514A(b)(1)(B) 6
18 U.S.C. 1514A(b)(2) 6
18 U.S.C. 1514A(b)(2)(D) 6
18 U.S.C. 1514A(c)(2) 5
18 U.S.C. 1514A(e) 5
5 U.S.C. 553(b) 47
5 U.S.C. 553(b)(A) 52
5 U.S.C. 706 51
18 U.S.C. 1341 5
18 U.S.C. 1343 5
18 U.S.C. 1344 5
18 U.S.C. 1348 5
18 U.S.C. 1513(e) 2, 8
28 U.S.C. 1292(b) 16
28 U.S.C. 2401(a) 45
49 U.S.C. 42121 6
49 U.S.C. 42121(b)(4)(A) 6
17 C.F.R. 240.21F-2(b)(1) 13
17 C.F.R. 240.21F-2(b)(1)(ii) ..... *passim*
29 C.F.R. 1980.104(a) 6
29 C.F.R. 1980.104(e) 6
29 C.F.R. 1980.105(a)(1) 6
29 C.F.R. 1980.105(c) 6
29 C.F.R. 1980.106 6
29 C.F.R. 1980.108(a)(1) 6
29 C.F.R. 1980.110 6
29 C.F.R. 1980.112(a) 6
Sup. Ct. R. 14.1(a) 44

Miscellaneous:
156 Cong. Rec. S5872 7
156 Cong. Rec. S5913 7
156 Cong. Rec. S5929 7

Page

Miscellaneous—continued:

75 Fed. Reg. (Nov. 17, 2010) 10
p. 70,488 ..... 10, 12
p. 70,495 ..... 10, 47
p. 70,496 ..... 10, 47, 48
p. 70,497 10
p. 70,511 10
p. 70,514 ..... 10, 48
p. 70,518 10
76 Fed. Reg. (June 13, 2011) 12
p. 34,300 ..... 12, 47
p. 34,301 12
p. 34,324 ..... 12, 48
p. 34,325 13
p. 34,326 12
p. 34,359 12
80 Fed. Reg. (Aug. 10, 2015) 13
p. 47,829 13
Rachel Beller, *Whistleblower Protection Legislation Of The East And West: Can It Really Reduce Corporate Fraud And Improve Corporate Governance?*, 7 N.Y.U. J. L. & Bus. 873 (2011) 4
Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* (Dec. 17, 2010) <tinyurl.com/uschambercomments> 34
Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121 (2014) 36
Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies & Whistleblowing Workers Under SOX*, 1 Wm. & Mary Bus. L. Rev. 431 (2010) 9
Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829 (2011) 33

Page

Miscellaneous—continued:
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 15
Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829 (Aug. 10, 2015) 34
Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488 (Nov. 17, 2010) 33
S. Rep. No. 107-146, 107th Cong., 2d Sess. (2002) 4
S. Rep. No. 176, 111th Cong., 2d Sess. (2010) 7
U.S. SEC, *2016 Annual Report To Congress On The Dodd-Frank Whistleblower Program* 10, 23 (2016) 8
U.S. SEC, *SEC Enforcement Actions Addressing Misconduct That Led To Or Arose From The Financial Crisis* (Oct. 7, 2016) 7

In the Supreme Court of the United States

No. 16-1276

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATUTORY PROVISIONS INVOLVED

In addition to the provisions reproduced in petitioner's brief (at 2-3), Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified at 15 U.S.C. 78u-6, provides in relevant part:

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

* * *

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

STATEMENT

A. Statutory And Regulatory Background

In two landmark acts in the past 15 years, Congress sought to deter securities-related misconduct. In each

law, whistleblower protections and incentives figured prominently in achieving that goal.

1. In 2002, Congress enacted Sarbanes-Oxley "to 'prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.'" *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162 (2014) (quoting S. Rep. No. 107-146, 107th Cong., 2d Sess. 2 (2002)); see Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746, 746. ("An Act [t]o protect investors by improving the accuracy and reliability of corporate disclosures"). The act represented an effort to "restor[e] trust in the financial markets" following a series of massive corporate scandals, most notably Enron's. S. Rep. No. 107-146 at 2. Enron had "used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." *Ibid.* Employees of both Enron and its accounting firm Arthur Andersen had participated in the fraud. *Lawson*, 134 S. Ct. at 1162. When other employees had tried to report the misconduct, including internally, "they faced retaliation, including discharge." *Ibid.* For instance, when one Enron employee attempted "to report accounting irregularities" internally, "the company sought advice on the legality of discharging" her, and Enron's outside counsel advised that there were no such restrictions. S. Rep. No. 107-146 at 5.

Congress accordingly "identified the lack of whistleblower protection as 'a significant deficiency' in the law." *Lawson*, 134 S. Ct. at 1162-1163 (quoting S. Rep. No. 107-146 at 10); cf., *e.g.*, Rachel Beller, *Whistleblower Protection Legislation Of The East And West: Can It Really Reduce Corporate Fraud And Improve Corporate Governance?*, 7 N.Y.U. J. L. & Bus. 873, 879 (2011) (discussing whistleblowers' "pivotal role in revealing corporate

fraud"). That was especially true for accountants and lawyers, who "[i]nstead of acting as gatekeepers who detect and deter fraud," "assist[ed] the fraud" and helped "cover[] it up." S. Rep. No. 107-146 at 20-21. Sarbanes-Oxley thus sought to remodel "the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent." *Id.* at 21; see *Lawson*, 134 S. Ct. at 1168, 1171 (emphasizing that Congress wanted to protect "countless professionals [like accountants and lawyers] equipped to bring fraud on investors to a halt").

Section 806 of Sarbanes-Oxley generally forbids widely-held public companies (and their subsidiaries and affiliates) from retaliating against whistleblowers who report internally or externally. 18 U.S.C. 1514A(a) (applying to any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))"); see *Lawson*, 134 S. Ct. at 1161, 1174. Under Section 1514A(a), titled "Whistleblower Protection for Employees of Publicly Traded Companies," these employees are protected for reporting "a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders," when they report to a federal agency, member or committee of Congress, or a supervisor or other internal investigative authority within the employer. 18 U.S.C. 1514A(a)(1)(A)-(C).

Section 1514A broadly authorizes "all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). That includes reinstatement, backpay, and special damages like emotional distress and reputational harm. See 18 U.S.C. 1514A(c)(2). It also prohibits pre-dispute arbitration agreements. 18 U.S.C. 1514A(e).

To obtain relief, the whistleblower must file a complaint with the Secretary of Labor within 180 days of the violation or the date she became aware of the violation, 18 U.S.C. 1514A(b)(1)(A), (b)(2)(D),[1] and can file suit in district court if a final decision is not issued within 180 days, 18 U.S.C. 1514A(b)(1)(B). The Secretary delegated to the Occupational Safety & Health Administration (OSHA) the responsibilities to handle complaints. On receipt of an administrative complaint, OSHA conducts an investigation if certain requirements are met. 29 C.F.R. 1980.104(a), (e). After completing the investigation, OSHA issues findings and, if "there is reasonable cause to believe that a violation has occurred," a preliminary order for make-whole relief. 29 C.F.R. 1980.105(a)(1). If the preliminary order requires reinstatement, that portion of the order is "effective immediately" on the company's receipt of the findings and preliminary order. 29 C.F.R. 1980.105(c).

The preliminary order is subject to two layers of administrative review: an appeal to an administrative law judge and then a petition for review with the Administrative Review Board. See 29 C.F.R. 1980.106-1980.110. During the administrative-review process, the Assistant Secretary for OSHA "may participate as a party or as amicus curiae at any time." 29 C.F.R. 1980.108(a)(1). After the administrative order becomes final, an aggrieved party may seek judicial review in circuit court under the strictures of the APA. See 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1980.112(a); 18 U.S.C. 1514A(b)(2) (incorporating the procedures of 49 U.S.C. 42121).

2. Despite Congress's efforts to curb abuse under Sarbanes-Oxley, corporate misconduct contributed to another financial crisis that culminated in 2008. See, *e.g.*, S.

---

[1] This period was originally 90 days.

Rep. No. 176, 111th Cong., 2d Sess. 2 (2010) (Dodd-Frank "is a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy"); U.S. SEC, *SEC Enforcement Actions Addressing Misconduct That Led To Or Arose From The Financial Crisis* (Oct. 7, 2016). Congress again responded with comprehensive legislation "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). And again Congress sought to advance that goal with a robust whistleblower provision. See, *e.g.*, 156 Cong. Rec. S5872, S5913, S5929 (daily ed. July 15, 2010) (statements of Sens. Cardin, Leahy, and Dodd).

Section 922 of Dodd-Frank (Section 21F of the Exchange Act) uses two devices to promote whistleblowing: monetary awards and anti-retaliation protections.

First, under the award provisions, a whistleblower who provides "original information" to the SEC that leads to "the successful enforcement" of an SEC action resulting in monetary sanctions over $1 million is entitled to a portion of the recovered sanctions. 15 U.S.C. 78u-6(a)(1), (b)(1). Congress limited the award program to individuals who reported to the SEC because the program revolves around the SEC using that information to prosecute an action, and it is undisputed that, for purposes of the program, a "whistleblower" is "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). While the incentives are powerful in theory, they have been limited in practice: Between August 2011 and the end of fiscal year 2016, the SEC received 18,334 tips, but made awards

to only 34 whistleblowers. U.S. SEC, *2016 Annual Report To Congress On The Dodd-Frank Whistleblower Program* 10, 23 (2016).

The second component of Dodd-Frank's whistleblower provision is its anti-retaliation protections, 15 U.S.C. 78u-6(h), which provides whistleblowers a direct private right of action. "No employer may" retaliate against a "whistleblower" for taking "any lawful act" in three scenarios. 15 U.S.C. 78u-6(h)(1)(A). The first two categories protect actions related to reporting to the SEC: "providing information to the Commission in accordance with this section" and "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(i), (ii).

Those protections (and the award program) were in the draft of Dodd-Frank passed by the House and Senate. The third category of anti-retaliation protections, however, was not added until much later, when the House and Senate conferees prepared a conference base text. See *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 152-153 (2d Cir. 2015) (recounting the history). This new category, in Subdivision (iii), refers broadly to a variety of laws that cover reporting to entities and individuals *other* than the SEC: "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii). Those incorporated provisions include ones that allow certain individuals—like auditors and attorneys—to report outside an organization (if at all) only after first reporting internally. See 15 U.S.C. 78j-1(b); 15 U.S.C. 7245.

By prohibiting retaliation regarding a broad category of protected disclosures, this provision supplements Sarbanes-Oxley's anti-retaliation provision, which had proven ineffective for the broad majority of whistleblowers. Cf., *e.g.*, Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies & Whistleblowing Workers Under SOX*, 1 Wm. & Mary Bus. L. Rev. 431, 432-435 (2010) (discussing empirical research on Section 1514A's ineffectiveness).

To enforce these protections, Section 78u-6 provides the whistleblower a private right of action in federal district court. 15 U.S.C. 78u-6(h)(1)(B)(i). Suit must be brought within either "6 years after the date on which the violation" occurred or "3 years after the date when" the material facts were "known or reasonably should have been known by the employee," though in no circumstances more than 10 years after the violation. 15 U.S.C. 78u-6(h)(1)(B)(iii). A prevailing plaintiff is entitled to reinstatement and two times backpay, but not special damages. See 15 U.S.C. 78u-6(h)(1)(C).

The whistleblower provisions of Dodd-Frank and Sarbanes-Oxley thus differ in multiple ways. In some important respects, Dodd-Frank's anti-retaliation whistleblowing protection is broader than its Sarbanes-Oxley counterpart: it does not require exhaustion; it imposes a longer limitations period; it provides for double backpay; and it restrains the actions of companies beyond those with a class of securities registered under 15 U.S.C. 78l or that file reports under 15 U.S.C. 78o (and their subsidiaries) (see 18 U.S.C. 1514A(a)).

But in other respects, Sarbanes-Oxley's whistleblower provision is more generous: it permits "special damages" like emotional-distress damages; it gives an employee the benefit of OSHA's investigative assistance; the employee

can obtain immediate reinstatement through the Sarbanes-Oxley administrative process; and Sarbanes-Oxley claims are not subject to pre-dispute arbitration provisions. Therefore, even if Sarbanes-Oxley generally has not been as effective as Congress had wished, there are still advantages for certain individuals to seek relief under Section 1514A.

3. In enacting Dodd-Frank, Congress expressly charged the SEC with "the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [Section 78u-6] consistent with the purposes of this section," 15 U.S.C. 78u-6(j), and ordered the agency to issue final regulations "not later than 270 days after July 2, 2010," 15 U.S.C. 78u-7(a).

Under that authority, the SEC published its notice of proposed rulemaking in November 2010. See 75 Fed. Reg. 70,488 (Nov. 17, 2010). A central focus of the notice was how to "preserv[e] [the] critical role for corporate self-policing and self-reporting." *Id.* at 70,496. The SEC explained that it "want[ed] to implement [Section 78u-6] in a way that encourages strong company compliance programs." *Ibid.*; see, *e.g.*, *id.* at 70,488, 70,514. The SEC recognized that internal reporting plays a substantial role in deterring and detecting corporate misconduct, and that promoting internal reporting harmonized Section 78u-6 with Sarbanes-Oxley. *Id.* at 70,518. The SEC therefore requested comment on "alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of" the statute, *id.* at 70,495, and also whether "the application of the anti-retaliation provisions [should] be limited or broadened in any other ways," *id.* at 70,511; see also, *e.g.*, *id.* at 70,497 ("[C]onsistent with Section 21F, how can the potential

negative impact on compliance programs be minimized?").

In response, some commenters proposed an obvious mechanism for encouraging internal reporting while reducing its risks: protect internal reporting. For example, several corporations (including Microsoft, Merck, Procter & Gamble, and Hewlett-Packard) recommended that, consistent with their advocacy for internal-reporting requirements, "[a] whistleblower who submits a good-faith report through an internal compliance program—like a whistleblower who submits a statement—under penalty of perjury to the Commission—should be entitled to the protection of the anti-retaliation provisions of Section 21F, beginning at the time of submission." Comment Letter 13 (Dec. 17, 2010).[2] And the District of Columbia Bar suggested "expand[ing] the anti-retaliation protections to apply to internal programs" and noted that Subdivision (iii) "allows the Commission to" do so. Comment Letter 4, D.C. Bar (Dec. 17, 2010).[3]

Those specific suggestions mirrored other commenters' broader assessments of internal reporting. The business community in particular emphasized the importance of internal reporting and its central role in Congress's overall regulatory scheme.[4] As they explained (and the

---

[2] Available at https://www.sec.gov/comments/s7-33-10/s73310-150.pdf.

[3] Available at https://www.sec.gov/comments/s7-33-10/s73310-146.pdf.

[4] Petitioner's Code of Conduct, in fact, instructs employees to report misconduct "to your supervisor," the general counsel, or through a telephone hotline. See Digital Realty Trust, Inc. Code of Business Conduct & Ethics 6, available at http://investor.digitalrealty.com/investor-relations/corporate-governance/governance-guidelines-and-documents/default.aspx.

agency recognized), internal reporting "[a]llow[s] companies to take appropriate actions to remedy improper conduct at an early stage," "[a]void[s] undermining internal compliance programs," "supplement[s], rather than supersede[s]" Sarbanes-Oxley's whistleblower protections, and "preserve[s] [the SEC's] scarce resources by relying upon internal compliance programs." 76 Fed. Reg. 34,300, 34,324 (June 13, 2011). Other commenters, however, noted problems with requiring internal reporting, namely, that it would "[p]lace whistleblowers at risk of retaliation," and that fear would "[r]esult in whistleblowers deciding not to report misconduct" at all. *Ibid.*

In adopting the final rule, the SEC reiterated that "[a] significant issue discussed in the Proposing Release was the impact of the whistleblower program on companies' internal compliance processes," and it thus sought to balance both sides of the debate. 76 Fed. Reg. at 34,300-34,301. The SEC recognized that internal reporting "may limit false and frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently." *Id.* at 34,359 n.450. At the same time, it concluded that strictly requiring internal reporting would not always achieve securities-law compliance and would be inconsistent with Section 78u-6. *Id.* at 34,324-34,326. Accordingly, while the SEC declined to require internal reporting, it nonetheless modified the proposed rules "to further incentivize whistleblowers to utilize their companies' internal compliance reporting systems when appropriate." *Id.* at 34,300-34,301; see *id.* at 34,324.

Next, having created a strong incentive to report internally (as urged by corporate stakeholders), the SEC also attacked a powerful disincentive to internal reporting: fear of retaliation. The final rule specified that, "[f]or

purposes of the anti-retaliation protections" of Section 78u-6, an individual is a whistleblower even if he did not report to the SEC. 17 C.F.R. 240.21F-2(b)(1). The SEC stated that this change "reflects the fact that * * * the third category [of whistleblowers under Section 78u-6(h)(1)(A)] includes individuals who report to persons or governmental authorities other than the Commission." 76 Fed. Reg. at 34,304. And amid detailing the "[a]dditional incentives" for internal reporting, the SEC noted that internal reporters would be protected: "Employees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by [Section 78u-6(h)(1)(A)(iii)], which incorporates the broad anti-retaliation protections of Sarbanes-Oxley." 76 Fed. Reg. at 34,325 n.223.

4. In 2015, the SEC reasserted its construction of Section 78u-6 with an interpretive rule. See 80 Fed. Reg. 47,829 (Aug. 10, 2015). It explained that the apparent disconnect between Section 78u-6(a)(6) and Subdivision (iii) of Section 78u-6(h)(1)(A) made the statute "ambiguous on the issue of the scope of the employment retaliation protections afforded thereunder." *Id.* at 47,829. The SEC stated that protecting internal reporting "best comports with our overall goals in implementing the whistleblower program" by "remov[ing] a potentially serious disincentive to internal reporting" that would conflict with the objective "to encourage internal reporting." 80 Fed. Reg. at 47,830. The guidance expressly rejected the Fifth Circuit's view that an individual must report to the SEC to qualify for those protections. *Id.* at 47,829-47,830 (discussing *Asadi* v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013)).

B. Facts And Procedural History

1. From 2010 to 2014, respondent worked as a Vice President of Portfolio Management for petitioner, a publicly-traded real-estate investment trust. Pet. App. 14a. Petitioner recognized respondent's exemplary performance throughout his tenure (until his pretextual termination), exceeding his annual bonus target each year. C.A. E.R. 125. Respondent's successful performance led petitioner to transfer him to its Asian Pacific region as that region's number-two employee under Senior Vice President Kris Kumar. *Ibid.* Driven by respondent's efforts, petitioner's Asian Pacific operations thrived: they expanded from 10 to 100 employees, increased petitioner's real-estate holdings from zero to nearly one million square feet, and invested almost $850 million dollars in new properties. *Ibid.* Respondent's salary at the time of his termination was over $200,000, and he held stock grants of over $625,000. *Ibid.*

Before petitioner terminated respondent, he alerted "senior management regarding possible securities law violations by the company." Pet. App. 3a. For example, he reported that "Kumar had committed a number of acts of 'serious misconduct,' including 'hiding [] seven million dollars in cost overruns'" on one development. *Id.* at 14a. Shortly thereafter, petitioner terminated respondent. He "was not able to report his concerns to the SEC before" his termination. *Id.* at 3a.

2. Respondent sued petitioner for violating Dodd-Frank's anti-retaliation whistleblower protections. Petitioner moved to dismiss, arguing that respondent was not a "whistleblower" under Section 78u-6 "because he did not report any alleged law violations to the SEC." Pet App.

17a. Petitioner did not challenge, and the court did not address, Rule 21F-2's procedural validity or whether the *Chevron* framework applied.[5]

The district court denied the motion. It explained that "[t]he determinative issue for resolving [petitioner's] motion to dismiss is whether SEC Rule 21F-2(b)(1) is entitled to *Chevron* deference." Pet. App. 22a. In examining whether Section 78u-6 unambiguously forecloses the SEC's interpretation, the court rejected petitioner's argument that Section 78u-6(a)(6)'s definition of "whistleblower" controls the outcome. *Id.* at 25a-30a. The court noted that, "while a statutory definition provides a 'very strong indication' of a term's meaning, it is 'nonetheless one that can be contradicted by other indications,'" such as when its "'artificial'" definition "'would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two.'" *Id.* at 27a-28a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)).

As the court reasoned, several aspects of the statutory scheme rendered the provisions ambiguous. For instance, the court explained that petitioner's interpretation would render Subdivision (iii) of Section 78u-6(h)(1)(A) superfluous, even assuming that that provision protects an individual who reports a violation both internally and to the SEC, because some statutes covered by Subdivision (iii) permit external reporting only in limited circumstances (if at all). *Id.* at 32a (discussing *Asadi*, 720 F.3d at 627-628).

---

[5] Petitioner also argued that respondent's failure to exhaust his administrative remedies under Sarbanes-Oxley doomed his Dodd-Frank whistleblower claim, but the court found this waived because it was asserted for the first time in petitioner's reply brief.

For instance, 15 U.S.C. 78j-1 requires an auditor to internally report misconduct, and allows external reporting only if the company fails to adequately respond. Pet. App. 33a-34a. Likewise, under 15 U.S.C. 7245 and corresponding SEC rules, attorneys may report violations externally only in rare situations, which leaves them "largely (if not entirely) unprotected from retaliation under" petitioner's understanding of Section 78u-6. *Id.* at 34a-35a. As more support for the statute's ambiguity, the court explained that a proper understanding of the Dodd-Frank and Sarbanes-Oxley whistleblower provisions retained meaning for the latter because a whistleblower may "prefer" Sarbanes-Oxley's scheme. *Id.* at 38a-39a. Moreover, petitioner's contrary interpretation would undermine Subdivision (iii)'s effectiveness "'as a preventative measure because employers would not know that a report was made to the Commission.'" *Id.* at 39a (citation omitted).

Finding the statute amenable to the SEC's interpretation, the court quickly resolved step 2 of the *Chevron* analysis: the SEC's construction was reasonable, because, among other things, it "encourages internal reporting" and "enhances" the statute's deterrent effects. *Id.* at 41a-43a.

The court accordingly denied petitioner's motion to dismiss, but certified for interlocutory appeal under 28 U.S.C. 1292(b) the question whether respondent qualified as a "whistleblower" for the anti-retaliation protections. *Id.* at 46a-47a.

3. The Ninth Circuit granted permission to appeal, and a divided panel affirmed. Pet. App. 1a-11a. Like the district court, the majority observed that definitional provisions "'can be contradicted by other indications,'" *id.* at 7a (quoting Scalia & Garner at 228), and wrote that by "[b]y broadly incorporating * * * Sarbanes-Oxley's disclosure

requirements and protections," Section 78u-6 "necessarily bars retaliation against" internal reporters. *Id.* at 6a. As the majority explained, "[p]rovisions of Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting." *Id.* at 6a-7a (discussing 15 U.S.C. 78k-1 & 7245). Leaving those reporters unprotected, the panel found, "would result in early retaliation before the information could reach the regulators." *Id.* at 7a. The court also rejected the Fifth Circuit's assertion that Sarbanes-Oxley's whistleblower protections "would be rendered moot or superfluous." *Id.* at 9a (citing *Asadi*, 720 F.3d at 628-629). Again, "Sarbanes-Oxley may be more attractive to the whistleblowing employee" who wants OSHA to spearhead the claims process or "who has suffered more substantial emotional injury than financial harm." *Ibid.* The majority therefore held that Subdivision (iii) "protect[s] those who report internally," and even if ambiguous, the SEC's interpretation was entitled to deference. *Id.* at 10a.

Judge Owens dissented. Pet. App. 11a. Without elaboration, he expressed his agreement with the Fifth Circuit in *Asadi* and the dissent in *Berman*. *Ibid.*

As in the district court, petitioner did not challenge Rule 21F-2's *procedural* validity (including any alleged notice-and-comment deficiencies), and neither the majority nor the dissent addressed it.

SUMMARY OF ARGUMENT

This is a *Chevron* case. The question is not simply a matter of construing the statute; Congress specifically tasked the SEC with enforcing these provisions, and the SEC has construed Dodd-Frank's anti-retaliation provision in a manner that advances Congress's objectives. In order to upset that construction, petitioner must not

merely establish that its preferred construction is reasonable, but that it is *mandatory*. As the courts below found, however, the better reading is that Congress did not intend to gut Dodd-Frank's new protections for entire categories of employees who perform possibly the most important role in disclosing corporate misconduct. Petitioner's cramped reading is at odds with the statutory text, its purpose, its structure, and its history. It has not shown that the SEC's interpretation is wrong, much less *unambiguously* foreclosed. The judgment should be affirmed.

1. Petitioner rests the core of its case on the statutory definition found in Section 78u-6(a)(6). Yet there is no mechanical rule that courts automatically shut down whenever a definition section appears. This Court has repeatedly reaffirmed that a definitional section does *not* control if it is incompatible with the statutory scheme.

A. Petitioner's understanding is squarely at odds with the statutory text and structure. Once petitioner's wooden rule is set aside, it becomes immediately clear that Congress was using "whistleblower" in its ordinary sense in Section 78u-6(h)(1)(A). While the provision did use the term "whistleblowers," there is no indication that it was used in anything but its usual sense. The term is a common word with an established meaning. There is no indication that it was used as a term of art; on the contrary, Congress repeatedly switched back and forth between other common terms ("individuals," "employees") in providing separate details of the *same* cause of action. And it specifically cross-referenced provisions that likewise used the term "whistleblower" in its idiomatic usage—as protecting internal disclosures. Under any fair reading of Section 78u-6(h)(1)(A), Congress intended to

do exactly what it said: prohibit employers from retaliating against disclosures "required or protected" by specified laws.

B. Petitioner's view would directly undermine the statutory scheme, and create a bizarre cause of action in the process. The overall securities framework relies directly on internal reporting. Indeed, internal reporting is often *mandatory* before an individual even has the option of reporting to the SEC. It plainly frustrates the securities regime to require internal reporting and then leave that internal reporting unprotected.

Nor does it square with usual congressional practice to broadly prohibit retaliation for defined disclosures, but then withdraw that protection unless an individual makes a *separate* disclosure—one typically unknown to the bad actor. That leaves individuals exposed despite disclosing exactly the kind of information Congress wants out in the open. And it makes protection turn on the happenstance of whether the employee manages to file a report with the SEC before the employer can wrongfully terminate the relationship. Courts are typically reluctant to attribute such a peculiar intent to Congress without language far clearer than this.

Nor does the SEC's view threaten to render Sarbanes-Oxley's anti-retaliation scheme "effectively obsolete." Each protective scheme presents its own set of benefits and costs; parties have different reasons for preferring each one, which is presumably why Congress gave injured claimants a choice between available remedies. Cf. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Indeed, even under petitioner's theory, there is a hypothetical subset of plaintiffs—those who use both internal and external reporting—that indisputably could invoke either set of remedies. No one seriously believes that this

choice threatens the "balance" between these integrated regulatory schemes.

C. Petitioner's argument is also out of step with the legislative history (and the realities of lawmaking). Subdivision (iii) was added at the last minute in a transparent effort to bolster whistleblower protection; it was not added to provide a heavily truncated remedy with virtually no realistic application. In the real world, it is entirely possible (indeed, probable) that the Conference Committee, at the last minute, failed to reconcile Congress's important new protections with the earlier definition of "whistleblower"—especially where no reconciliation was obviously needed (the context: a common term, a provision that protects *internal* reporting, and surrounding provisions using the term in common parlance to mean what it usually means—internal or external reporting).

2. Petitioner's tardy attack on the procedures used in SEC rulemaking is both improperly presented and meritless. The issue was not raised or resolved at any point below, and it was not asserted (or even mentioned) until the merits brief in this case. Even if the issue somehow falls within the Court's power to review, it should be set aside as a matter of prudence: it turns on a host of new points that no court has ever resolved, and it is too late for petitioner to reinvent its case in this Court.

In any event, the issue is insubstantial on the merits. The SEC's rule was a logical outgrowth of the notice-and-comment proceedings, where all parties were aware of the critical need to protect internal reporting. Petitioner cannot explain how it was prejudiced by any error, and it further cannot explain how it asserted the challenge within the APA's deadline for raising procedural attacks on past agency rulemaking.

The SEC exercised its expert judgment to read the statute sensibly to protect the overall securities scheme

and Congress's interest in these important issues—just as the SEC was explicitly charged to do. Petitioner's last-ditch attack on its rule is unavailing, and the judgment below should be affirmed.

ARGUMENT

I. THE SEC PROPERLY CONSTRUED DODD-FRANK'S ANTI-RETALIATION PROVISION TO PROTECT INTERNAL REPORTING AND ITS CENTRAL ROLE IN CONGRESS'S REGULATORY SCHEME

1. Petitioner frames this case as presenting a "simple question of statutory interpretation" (Br. 3), but that is wrong. This case does not simply involve construing a statute, but reviewing an *agency's construction* of that statute.

Congress expressly delegated authority to the SEC to administer Section 78u-6: "The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. 78u-6(j); see *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (describing breadth of analogous delegation). Petitioner has no real answer for this broad delegation of power, so it barely acknowledged the SEC's vital role in this process. It did not cite (much less reproduce) the controlling language of Section 78u-6(j). And petitioner did not grapple with how this textual delegation confirms Congress's view of the SEC's importance in construing these interlocking schemes (Dodd-Frank and Sarbanes-Oxley). But Congress did indeed expressly charge the SEC with enforcing these provisions, 15 U.S.C. 78u-6(j), and the SEC invoked that authority in construing the statute to protect internal whistleblowing, 17 C.F.R.

240.21F-2(b)(1)(ii). This Court's familiar *Chevron* framework thus applies.

"*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan*, 135 S. Ct. at 2707 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). In order to set aside the agency's interpretation, petitioner must not merely establish that its preferred construction is reasonable, but that it is *mandatory*—the statute must "unambiguously foreclose[] the agency's interpretation." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). Unless Congress spoke to the "precise question" at issue, the agency's position is entitled to deference. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Under this inquiry, ambiguity is not determined by reading the challenged provision on its own. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132; see also, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. * * * Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting

any precedents or authorities that inform the analysis."); *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990).

"Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives," exercising "its experience and expertise in protecting the rights of those who are covered by the Act." *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 403 (2008).

2. According to petitioner, this traditional inquiry is short-circuited by the presence of Section 78u-6(a)(6)'s statutory definition: "Where 'a statute includes an explicit definition,' the Court 'must follow that definition, even if it varies from th[e] term's ordinary meaning.'" Br. 17 (quoting *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000)). Petitioner vastly overstates its case.

While "the terms of a definitional subsection are usually to be taken literally," "'[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.'" *Berman*, 801 F.3d at 154 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 227-228 (2012)). Courts "need not read the statutory definition mechanically" into each provision, especially where doing so "would defeat the purpose of the legislation." *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983). "[W]e have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts." *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949).

Thus, contrary to petitioner's contention (Br. 16-19), "[t]he use of a term in one part of a statute 'may mean [a] different thing[]' in a different part, depending on context." Pet. App. 7a (quoting *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)); see also, *e.g.*, *Nw. Austin Mun. Util.*

Dist. No. One v. *Holder*, 557 U.S. 193, 206-207 (2009). A definitional section is not automatically controlling, and courts must still ask whether Congress intended the statutory definition to apply in each section of the Act. See *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 201 (1949); see also *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (rejecting "EPA's rigid insistence" that "the Act-wide definition[]" applies "no matter how incompatible that inclusion is with th[e] programs' regulatory structure").

3. As explained below, every indication here supports cabining Section 78u-6(a)(6)'s definition to its intended scope—which does *not* include Dodd-Frank's anti-retaliation provision. Once petitioner's wooden rule is set aside, it becomes immediately clear that Congress was using "whistleblower" in its ordinary sense in Section 78u-6(h)(1)(A). That construction alone explains the neighboring text in Subsection (h)(1) itself, the cross-referenced text in Sarbanes-Oxley, and the neighboring provisions of Dodd-Frank; it alone comports with the undeniable legislative purpose of Section 922, and the overall regulatory scheme—with its heavy emphasis on internal reporting; and it alone avoids creating a bizarre and incoherent statutory scheme, where protection is supplied (and withdrawn) effectively at random.

In the end, petitioner's cramped interpretation is directly at odds with Section 78u-6's text, purpose, structure, and history, which is precisely why the SEC (as the agency tasked with its enforcement) has *twice* rejected it in formal pronouncements. In order for petitioner to prevail, it must demonstrate that Congress unambiguously foreclosed the SEC's interpretation of the statute it was explicitly charged with administering. As the majority of

courts have determined, petitioner cannot overcome that heavy burden. The judgment should be affirmed.[8]

A. The Anti-Retaliation Provision's Text And Structure Confirm That Congress Did Not Limit Its Express Protection Of Internal Reporting To Those Who Report Externally To The SEC

Petitioner primarily stakes its case on the statutory definition in Section 78u-6(a)(6). But as explained above, there is no mechanical rule that courts inexorably apply a statutory definition in every surrounding provision. The presumption that the definition controls is simply that—*a presumption*. Although admittedly rare, courts will depart from that presumption in appropriate circumstances. *Nw. Austin*, 557 U.S. at 206-207; *Lawson*, 336 U.S. at 201. Section 78u-6's text and structure confirm that this is one of those unusual situations.

1. While Section 78u-6(h)(1) did use the term "whistleblowers," nothing suggests it was used in anything but its ordinary sense. The term is a common word with an established meaning. There is no indication it was used as a term of art. Congress did not use a capital "W" when identifying the targets of the prohibited retaliation, and it did not explicitly refer back to the definitional section. See *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes,

---

[8] If anything, the broad conflict below confirms the patent ambiguity in the statute. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("In light of the two dissents from the opinion of the Supreme Court of California, and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here.") (footnotes and internal citations omitted).

sometimes even in different provisions of the same statute.").

What Congress did do, however, was telling. Subdivision (iii) textually cross-references provisions in Sarbanes-Oxley that do *not* require reporting to the SEC *and yet define the protected class as "[w]histleblower[s],"* 18 U.S.C. 1514A(a)(1)(C) (Sarbanes-Oxley). Those incorporated provisions thus use the identical term—*referenced in Subdivision (iii) itself*—without any indication that Congress viewed "whistleblower" as a defined term of art. See *Nw. Austin*, 557 U.S. at 206; *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (looking to the "[t]extual cross-reference").

Moreover, Congress repeatedly switched back and forth between terms *in the very neighboring sections detailing the same cause of action.* See *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). Congress thus said that "[a]n individual"—not a "whistleblower"—can "enforce" this cause of action, 15 U.S.C. 78u-6(h)(1)(B)(i); it defined the limitations period by reference to when "the employee"—again, not the "whistleblower"—should have known of the violation, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(bb); and it switched yet again in enumerating the available relief "an individual" could recover, 15 U.S.C. 78u-6(h)(1)(C). These common terms carry no talismanic significance—Congress was using the terms ("whistleblower," "individual," "employee") interchangeably. See *Lawson*, 336 U.S. at 201 ("It is evident, therefore, that the definition of disability was 'not made with watch-like precision' and should not be so applied in § 8(f)(1)."). This is directly at odds with the notion that Congress deliberately, and only implicitly, placed a significant restriction on the scope of Subdivision (iii) by invoking a common term defined *seven subsections* earlier in the statute. *Utility Air Regulatory Group* v. *EPA*, 134 S.

Ct. 2427, 2441 (2014) ("the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies'"); see also *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595-596 (2004).

Finally, in the same section of Dodd-Frank (Section 922), Congress specifically amended aspects of Section 1514A—which, again, deals with internal reporting—and then *labeled those sections as "whistleblower protections."* See Section 922(c), (d)(1). Congress thus repeatedly used "whistleblower" as a common term with an accepted definition in ordinary usage. It did not treat the word as a term of art with a defined meaning *aside* from its treatment concerning the incentive-awards program. Compare *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("Although we generally presume that 'identical words used in different parts of the same act are intended to have the same meaning,' the presumption 'is not rigid,' and 'the meaning [of the same words] may well vary to meet the purposes of the law.'") (internal citations omitted); *Stenberg*, 530 U.S. at 992-993 & n.9 (Thomas, J., dissenting) ("By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding of 'partial birth abortion,' for that term itself, no less than the specific definition, is part of the statute. * * * It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning. But this does not mean that the ordinary and plain meaning of a term is wholly irrelevant when that term is defined.") (internal citation omitted).

This significantly undercuts petitioner's textual argument; at a minimum, it creates substantial ambiguity in the statutory scheme.

2. There is yet more significant and obvious tension between Subsection (a)(6)'s narrow definition and the broad anti-retaliation protection under Subdivision (iii). By its terms, Subdivision (iii) protects internal disclosures (such as those under Section 1514A), but does not limit that protection to those who also report to the SEC. See, *e.g.*, *Berman*, 801 F.3d at 147 ("the issue presented is whether the 'whistleblower' definition in [Section 78u-6(a)(6)] applies to subdivision (iii)," which "does not within its own terms limit its protection to those who report wrongdoing to the SEC"). "The statute's definition of 'whistleblower,' which requires a disclosure to the SEC, therefore exists in tension with subsection (iii) of the anti-retaliation provision, which protects a broad range of disclosures to entities other than the SEC." *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 729 (D. Neb. 2014). That tension has an easy resolution: when "the anti-retaliation provision is read using the word 'whistleblower' in its everyday sense, there is no such tension," and "all parts of the statute fit together into a harmonious and coherent whole." *Ibid.*

In response, petitioner argues that the provisions work together under its cramped view: the definitional section identifies *who* is protected, and the prohibition identifies actionable conduct *for the protected class*. Br. 16-17. Petitioner's view is a *possible* explanation, but not a *mandatory* explanation. It is possible that Congress meant to drastically limit subdivision (iii) with the definition section invoked *seven* subsections earlier. But it is also possible that the choice of words was a remnant from an earlier version of the Act, when the term "whistleblower" was inserted in Section 78u-6(h)(1)(A) *before* the

critical Subdivision (iii) was created. See Part I.C, *infra* (explaining the history of Dodd-Frank's passage). And it is further possible that Congress was simply using whistleblower in its idiomatic sense.

The important point, however, is that unless petitioner's view unambiguously forecloses any contrary interpretation of the statute, it cannot overcome the SEC's expert construction of the statute. These competing constructions present an obvious case of ambiguity.

3. Petitioner's reading is also out of step with the grammatical structure of the anti-retaliation prohibition. The provision's plain language is drafted as a *prohibition* directed to employers. It says what employers may *not* do, and outlines the "lawful act[s]" they may not punish, including internal reporting "required or protected" under Sarbanes-Oxley. The focus of the provision is thus on the wrongdoer, not the victim. It only mentions the victim—"a whistleblower"—indirectly as the target of the prohibited conduct. This would be a surprisingly backdoor way to impose such a serious limitation on the broad relief otherwise set forth in Subsection 78u-6(h)(1)(A).

Congress deliberately added a broad prohibition that protects internal reporting, and it is reasonable to presume this expansive protection was not included to provide minimal or no protection to any meaningful group under the Act: "In short, we disagree with petitioner's reading of the text of the Act and think it unreasonable to assume that Congress intended to enact such a truncated version of an important [securities] statute." *Holloway* v. *United States*, 526 U.S. 1, 12 (1999).

4. According to petitioner, the Act's structure supports its position. Br. 20-22 (explaining the Act's treatment of the incentive program and the anti-retaliation provision). This is wrong on multiple levels. First, the di-

vision between bounty awards and anti-retaliation protections supports *respondent*, not petitioner. The first part of the section provides awards but limits those awards to disclosures to the SEC. This is the obvious focus of the definition: the awards are tethered to agency actions, so the agency must receive the relevant information.

The second half provides protections against unlawful conduct. The focus there is prohibiting wrongful behavior, not rewarding SEC disclosures. If the focus were still limited to providing information to the SEC, the retaliation protection would be limited to SEC disclosures. The broader sweep of Subdivision (iii) corresponds with a broader focus in that provision. The clear tension between the definition in Subsection 78u-6(a)(6) and the protected conduct in Subdivision (iii) is readily resolved, again, by giving the subdivision its natural sweep and according whistleblower its natural meaning.

In response, petitioner asserts that Subdivision (iii) serves a different purpose: "By virtue of that clause, a whistleblower who reports alleged misconduct both to the SEC and to another entity has the same protection from retaliation—and thus the same incentive to report to the SEC—as a whistleblower who does not make the additional disclosure." Br. 22. This is a non-sequitur. Congress did not need to protect the *internal* disclosure to provide "the same incentive to report to the SEC"; Congress had to protect the internal disclosure *to provide the incentive to make the internal disclosure*. The incentive to report to the SEC was already secured by Subdivisions (i) and (ii)—full stop. The "gap" filled (Br. 22) by Subdivision (iii) was the need to protect those internal disclosures that are essential to the overall securities scheme and serve as a necessary predicate to substantial categories of external reporting.

5. As multiple courts have recognized, petitioner's reading arguably creates a surplusage problem in Subdivisions (i) and (ii). Those provisions specifically limit protection to disclosures made "to the Commission"—a concept already embedded in the statutory definition. Had Congress truly intended to limit the anti-retaliation provision to "whistleblowers" under Subsection (a)(6), it would have had no need to repeat that limiting language in those provisions. See, *e.g.*, *Berman*, 801 F.3d at 154 (explaining that the textual references to the SEC-disclosure requirement would debatably "be superfluous" under petitioner's construction).

In response, petitioner argues that those terms "clarify" the statutory scope, and Congress is not obligated to draft statutes using the fewest possible words. Br. 36. It is true that there is no principle requiring Congress to write economically. But when one construction creates unnecessary verbiage and another does not, there is at least some value in adopting the reading that gives meaning to each word.

Petitioner also overlooks a more fundamental point. The fact that Congress specifically invoked narrowing language ("to the Commission") in Subdivisions (i) and (ii) suggests that Congress did not view the term "whistleblower" as already imposing the same limitations. This at least suggests tension with the presumption that whistleblower was not used in its ordinary sense.[7]

---

[7] According to *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), removing the SEC reporting requirement from Subdivision (iii) would "violate the surplusage canon" by "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." 720 F.3d at 628. This is wrong. That "definition" would still retain force in the broad-

6. According to petitioner, its view is supported by Congress's use of different language in Title 12's anti-retaliation provision regarding the Consumer Financial Protection Bureau (CFPB). Br. 23-24. Petitioner argues that this provision—12 U.S.C. 5567—phrased its protection in terms of a "covered employee," not a "whistleblower," and Congress would have employed a similar formulation if it had so wished in Section 78u-6. *Ibid.*

But Section 5567 covers a far broader set of conduct, including acts not commonly described as "whistleblowing": it prohibits, for example, retaliation for filing consumer-protection suits or even "refus[ing] to participate" in certain activities, even if the refusal was unaccompanied by any report to a supervisor or external entity. 12 U.S.C. 5567(a)(3), (4). The broader label was necessary to capture the broader set of conduct. Here, by contrast, the prohibited disclosures fit comfortably within the heartland of whistleblowing in its traditional sense.

In any event, Dodd-Frank spanned hundreds of pages and covered countless provisions on all manner of subjects. Congress may have considered the CFPB provision in crafting Section 78u-6, but it is far more likely that Congress considered the immediately cross-referenced provisions of Sarbanes-Oxley (Section 1514A) that describe internal reporters as "whistleblowers." If it was inspired to

---

est sweep of the statute, including the key provisions limiting the universe of individuals eligible for incentive awards. See, *e.g.*, 15 U.S.C. 78u-6(b)(1). But as *Berman* explained, the question is not what the definitional section means, but rather whether it applies at all to subdivision (iii). 801 F.3d at 147; see also *Robinson*, 519 U.S. at 343 ("those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts"). In light of the statute's plain text, structure, and purpose, the answer is plainly no. Notably, petitioner does not even attempt to defend this aspect of the Fifth Circuit's decision.

use any terms, it likely took that inspiration based on the provisions more immediately relevant to its task at hand.

B. The SEC's Construction Of Subdivision (iii) Is Necessary To Promote And Protect Congress's Statutory Objectives And The Overall Regulatory Scheme

Petitioner's theory is irreconcilable with Dodd-Frank's legislative purpose. If adopted, it would render entirely insignificant a critical anti-retaliation safeguard, and do so in a way that would upset the proper operation of both Dodd-Frank and Sarbanes-Oxley—while leaving a puzzling and arbitrary cause of action in its wake. The expert agency rejected petitioner's position for a reason, and that expert view warrants respect.

1. Petitioner's view is incompatible with the overall statutory scheme. Sarbanes-Oxley's chief focus is on internal compliance and internal reporting. *E.g.*, Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829, 1832 (2011); see, *e.g.*, 15 U.S.C. 7262. Yet a rule hinging protection exclusively on *external* reporting directly frustrates that statutory objective. It discourages the use of internal policing, and defeats the point of setting up "internal processes for investigating and responding to potential violations of the Federal securities laws." Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010). "Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829,

47830 (Aug. 10, 2015). Petitioner's competing interpretation, by contrast, "would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting." *Ibid.*[8]

The SEC properly recognized that Congress did not intend to create "a 'two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances.'" Pet. App. 42a. By directly frustrating Sarbanes-Oxley's key framework, petitioner's theory would create an incoherent statutory scheme. See, *e.g.*, *Utility Air*, 134 S. Ct. at 2442 (asking whether a construction is "incompatible * * * with th[e] programs' regulatory structure"); *Brown & Williamson*, 529 U.S. at 133 ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted).

2. Petitioner's view would not only cripple Sarbanes-Oxley's reliance on internal reporting, but also frustrate the practical operation of Dodd-Frank itself. Under federal law, internal reporting is often a *precondition* to external reporting. It makes a mockery of the overall regulatory scheme to suggest that internal reporting is required but will not be protected—even though internal reporting is required in the broadest swath of cases before any information can be disclosed to the SEC.

---

[8] As noted earlier, the U.S. Chamber of Commerce participated in the rulemaking process, submitting a comment (together with other groups) underscoring "the important role that internal corporate programs have in promoting compliance with securities and other laws," and arguing that "preserving that role should be a policy touchstone in formulating rules to implement the Dodd-Frank whistleblower provisions." Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* 3 (Dec. 17, 2010) <tinyurl.com/uschambercomments>.

The end result is that potential whistleblowers—even those willing to eventually disclose to the SEC—will be chilled before they can even start the progression to filing an external report. That is bad for both Sarbanes-Oxley and Dodd-Frank, and it is a strange intent to ascribe to a Congress determined to protect whistleblowers—lowercase "w"—from unlawful acts.

3. Petitioner's interpretation "would, in effect, all but read subdivision (iii) out of the statute." Pet. App. 8a. This Court has repeatedly rejected statutory readings that would render terms "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Yet petitioner's reading would "narrow[]" subdivision (iii) "to the point of absurdity." Pet. App. 8a. It would entirely cut out protections for lawyers and auditors—two key groups with essential roles in catching and stopping unlawful conduct. *Lawson*, 134 S. Ct. at 1170; *Berman*, 801 F.3d at 151 ("[T]here are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer. Chief among these are auditors and attorneys."). If an employee must report internally before having the option of reporting to the SEC, the employee is left without any meaningful protection at all—"that required preliminary step would result in early retaliation before the information could reach the regulators." Pet. App. 7a; see also *id.* at 8a ("Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. The anti-retaliation provision would do nothing to protect

these employees from immediate retaliation in response to their initial internal report.") (citation omitted).[9]

Given the critical roles occupied by lawyers and auditors under both Dodd-Frank and Sarbanes-Oxley, it is implausible that Congress intended to strip away their protections in such an indirect fashion. See, *e.g.*, *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162, 1168 (2014).[10]

Even aside from those professionals, "although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number." *Berman*, 801 F.3d at 151. Indeed, while *Asadi* imagined this hypothetical group to give subdivision (iii) some effect, 720 F.3d at 627-628, it failed to identify a single, real-world example fitting this unusual pattern.[11] "Thus, apart

---

[9] Petitioner is correct that Congress is not *obligated* to extend protections to all classes of individuals. Br. 35. But the question is one of prudence, not power: it is exceptionally unlikely that Congress would have recognized the critical role played by accountants and lawyers and then silently excluded them, for all practical purposes, from Dodd-Frank's reach. Nor does it matter that some accountants or lawyers might report internally and externally without being terminated. That possibility is cold comfort to the professional who is forced to put her livelihood on the line to risk the unprotected internal report.

[10] It is true that lawyers and accountants (and any other group excluded by petitioner's reading) would still be able to take advantage of Sarbanes-Oxley's remedies under Section 1514A. But those remedies have proven ineffective for most claimants, and Congress felt an obvious need to provide a robust choice of remedies to ensure whistleblowers are protected. It would be passing strange to presume Congress granted a remedy—designed to improve disclosure—only to withdraw that remedy for key groups that otherwise play essential roles in ferreting out securities violations.

[11] See Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) ("The

from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope." *Berman*, 801 F.3d at 152 (footnote omitted); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001) (asking whether a construction "would in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances"); *Robinson*, 519 U.S. at 346.[12]

4. Petitioner's statutory construction also introduces a multitude of anomalies into the statutory scheme. First, it would create a wholly arbitrary form of protection: It leaves individuals unprotected who report internally *as part of a mandatory progression to reporting to the SEC.* Indeed, it would even leave individuals unprotected *who later report to the SEC.* That means that individuals would receive protection, or not, based on how quickly they fall victim to unlawful conduct. It would be highly unusual for Congress to withdraw protection from someone for faithfully discharging her duties to use mandatory internal channels before reporting to the SEC.

Second, despite prohibiting retaliation for specific disclosures, liability would attach entirely based on a *separate* disclosure to the SEC *that employers will typically have no idea actually occurred.* That means the identical misconduct will go punished or not based on the happenstance of a separate report, and the wrongdoer will not

---

Fifth Circuit is also unable to point to any concrete examples of such a situation ever occurring.").

[12] Petitioner cites a small handful of examples of individuals who reported both internally and to the SEC. These isolated instances hardly provide any meaningful scope to this important statutory safeguard.

even be aware of the dispositive factor that activates or withdraws the protection. To say the least, that describes an incredibly unusual statutory scheme. It is not typical for Congress to identify wrongful conduct, declare that wrongful conduct "prohibited," and then hinge everything on a *separate* disclosure that has nothing to do with the wrongful act.[13]

This is a perplexing view to ascribe to Congress. It recognizes that Congress wanted to deter and punish retaliation for specific disclosures (those identified in Subdivision (iii)) but decided to leave *that exact misconduct* unpunished because an individual did not make some separate disclosure to the SEC. One would expect a clear statement before assuming Congress intended to embrace such a puzzling scheme.[14]

5. Petitioner, like the Fifth Circuit, maintains that the SEC's rule would render Sarbanes-Oxley's enforcement scheme "moot" because "no one would use it." Pet. App. 9a (describing *Asadi*, 720 F.3d at 628-629); Br. 28-29 (arguing that the Act's scheme will become "obsolete" because Dodd-Frank affords advantages that Sarbanes-Oxley does not). But this theory has been squarely refuted by the SEC, as "Sarbanes-Oxley may be more attractive

---

[13] Petitioner's theory produces other odd and unworkable results. If a whistleblower reports once to the SEC, are they forever protected for all internal reports? Is there a time-limit? Is there a nexus requirement between the subjects disclosed to the SEC and the subjects disclosed internally? (Note the lack of any textual hook requiring that the disclosures are close in time or subject-matter.)

[14] Section 1514A is limited to retaliation by only certain organizations, while Subsection (h)(1)(A) covers *all* employers. This daylight reveals that some individuals, under petitioner's reading, will have no remedy if they face retaliation for filing an internal report. This would strangely leave retaliatory acts unpublished that Congress declared wrongful and prohibited.

to the whistleblowing employee" in numerous ways. Pet. App. 9a (describing the SEC's arguments).

First, while petitioner presumes that most parties wish to avoid administrative review, that is certainly not true for all parties. Under Sarbanes-Oxley, the agency "tak[es] responsibility for asserting the claim on the whistleblower's behalf," thus reducing "cost[s]" and "stress[]" for parties otherwise pursuing relief on their own in federal court. *Ibid.* Just as employers often prefer administrative review, employees may likewise prefer it for similar reasons.

Second, while Dodd-Frank does authorize double backpay, see 15 U.S.C. 78u-6(h)(1)(C), Sarbanes-Oxley authorizes "all relief necessary to make the employee whole," including "compensation for any special damages," 18 U.S.C. 1514A(c)(1), (2)(C) (also protecting against pre-dispute arbitration agreements). See Pet. App. 9a-10a (citing *Jones* v. *SouthPeak Interactive Corp.*, 777 F3d 658, 672 (4th Cir. 2015)). Although some employees will favor double backpay, "[a]n employee who has suffered more substantial emotional injury than financial harm would likely be better off with Sarbanes-Oxley's allowance for special damages." Pet. App. 9a-10a.

In the end, it makes little sense to presume, as petitioner does, that Congress would have created a powerful new anti-retaliation remedy, but withheld that remedy to all those who faithfully discharge their statutory, regulatory, and corporate duties to report via internal channels—thus leaving those employees completely unprotected during the periods before disclosure to the SEC is even possible.[15]

---

[15] Petitioner faults the SEC for picking and choosing elements of the statutory definition, suggesting the agency invented out of whole

C. The Legislative History Reaffirms That Congress Expanded Subdivision (iii) To Protect Internal Reporting

1. Contrary to petitioner's contention (Br. 24-26), the legislative history supports the SEC's interpretation. While the congressional record is limited, this provision was added at the last minute by the Conference Committee in reconciling the House and Senate versions of Dodd-Frank. *Berman*, 801 F.3d at 152-153 & n.8. It takes little imagination to understand what happened: "When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." *Id.* at 154.

This is a provision designed to protect a vulnerable class and deter unlawful conduct. It is "doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in [subsection (a)]." *Berman*, 801 F.3d at 155; see also *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) ("we have explained that the statute

---

cloth the securities-nexus. Br. 34. Petitioner misreads the SEC's regulation, which textually includes any disclosures protected by Section 1514A; it accordingly does *not* have an artificial limitation. As for petitioner's far-fetched hypotheticals about employees being fired for reporting on drug-dealing colleagues, suffice it to say that the Court has already refused to distort the natural reading of a statute based on similar possibilities (see *Lawson*, 134 S. Ct. at 1168 (rejecting hypos based on gardeners and housekeepers)), and it is unusual to find fault in a scheme that captures mail fraud—where Sarbanes-Oxley itself captures mail fraud. (Corporations, in any event, benefit from ferreting out *any* illegal activity occurring under the company roof.)

should be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes"'").

In response, petitioner says that Congress "intended for whistleblowing employees—who face heightened risks when they report their employers' misconduct to the SEC—to have heightened protection against retaliation under the Dodd-Frank Act." Br. 25. That explanation might explain Subdivisions (i) and (ii)—both of which concern reports to the SEC—but it does not explain Subdivision (iii)'s expansive protection for disclosures "required or protected" by other laws. 15 U.S.C. 78u-6(h)(A)(1)(iii). A simpler explanation exists: Congress intended to protect disclosures—*required or protected by other laws.*

Moreover, that purpose is consistent with getting information to the SEC: Because many groups are required to report internally, providing protection for that internal reporting advances the mandatory progression for information ultimately to reach the SEC. This protection thus twice advances Congress's objectives: it secures the integrity of the overall regime's focus on internal reporting, and it promotes the use of internal channels that otherwise stand in the way of external reporting.

2. According to petitioner, the legislative history supports its narrow view of the statute. As petitioner notes, the bill that originated in the House covered "employee[s], contractor[s], or agent[s]," and the Senate later "narrowed the [anti-retaliation] provision to cover only 'whistleblowers,' and Congress enacted the narrower version." Br. 25-26. Petitioner thus argues that the SEC's reading improperly tries to "restore the discarded statutory language." Br. 26.

Petitioner's argument suffers from a logical flaw. At the time of the Senate's amendment, *both* versions—House and Senate—were limited *to protecting disclo-*

sures to the SEC. Thus the change in language did absolutely nothing to modify the scope of the statute: it protected the same class later defined as "whistleblowers" both before and after the (stylistic) change.

Had the Senate replaced the House's version ("employee, contractor, or agent") at the same time Subdivision (iii) was added, then petitioner's argument would have greater purchase. But the existing chronology actually cuts *against* it: The very fact that the definition made sense *at the time it was drafted* suggests it was not a deliberate choice to limit the scope of a provision *that did not yet exist.* The far more likely explanation, looking to the real world, is that Congress failed to reconcile the important new protection in Subdivision (iii) with the *preexisting* language because it was focused on the new addition.[16]

3. Petitioner further overstates the significance of commentary in the legislative record, which predominantly focused on channeling information to the SEC. Br. 24. None of these statements addressed the proper scope of Subdivision (iii) because *none were made after Subdivision (iii) was added to the provision.* It is little surprise that Congress did not acknowledge the section's expanded scope before it was actually expanded.

II. PETITIONER'S APA PROCEDURAL CHALLENGES ARE BOTH MERITLESS AND NOT PROPERLY PRESENTED

As an alternative attack on the decision below, petitioner contends that, even if the SEC reasonably construed the statutory text, its interpretation nonetheless

---

[16] At that time, the definition applied to restrict the SEC incentive program to those providing information to the SEC, and it matched the initial, narrow scope of the anti-retaliation protection. See, *e.g.*, *Berman*, 801 F.3d at 152-153 & n.8

does not warrant deference because its rule is procedurally defective. Br. 41-44. This challenge fails on multiple levels. First, the Court should not consider this issue because petitioner did not raise it below or in its certiorari petition. Indeed, we have not found *any* court that has addressed these procedural arguments. Second, Rule 21F-2 survives because the procedural attacks are time-barred and substantively baseless. Third, regardless, the SEC's construction of the statute constitutes an interpretive rule that warrants *Chevron* deference even without any notice-and comment rulemaking.

A. The Court Should Not Consider Petitioner's New Procedural Challenges

Petitioner claims that Rule 21F-2 is procedurally invalid because it was not a "logical outgrowth" of the SEC's notice of proposed rulemaking and lacks an adequate explanation. Petitioner did not raise these challenges below, the lower courts did not mention them, and this Court should not consider them.

1. The Court generally refuses to consider "'questions not raised or resolved in the lower court[s].'" *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (alteration in original) (citation omitted). "Although in some instances [the Court] ha[s] allowed a respondent to *defend* a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petition to assert new substantive arguments *attacking*, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (emphases added) (citation omitted).

Petitioner is attempting to do just that. Its primary (and previous) attacks were *substantive* challenges; this new approach is wholly *procedural*. It did not raise this

procedural issue in the Ninth Circuit (or the district court), and neither court addressed it. These procedural questions are wholly distinct from the issues that were raised and resolved. The issue petitioner litigated below turns on the statutory text and all the usual tools of statutory construction. Petitioner's procedural challenges, by contrast, depend on the intricacies of the rulemaking process independent of the statute's meaning, and would require the Court to address a host of sub-arguments to resolve the rule's procedural validity and *Chevron*'s applicability.

The Court should therefore adhere to its normal practice—even stronger where the new argument is one *attacking* the judgment under review—and decline to address these contentions. See, *e.g.*, *Chaidez* v. *United States*, 568 U.S. 342, 357 n.16 (2010) (while considering a *Teague* retroactivity analysis, refusing to consider petitioner's "back-up arguments" that *Teague* did not even apply, because they were made for the first time in the petitioner's opening brief).

2. For similar reasons, petitioner's procedural attacks are not "fairly included" within the question presented. Sup. Ct. R. 14.1(a). These issues were not even hinted at in petitioner's certiorari petition, and they pose considerations entirely separate from the statute's meaning. While they "may be '*related*'" or "'*complementary*'" to the question presented, "they are 'not fairly included therein.'" *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation omitted) (emphasis in original); see also, *e.g.*, *S.F. Arts & Athletics, Inc.* v. *U.S. Olympic Committee*, 483 U.S. 522, 547 n.30 (1987) (holding that the petitioner's "new theory of governmental action is not fairly encompassed within the questions presented and thus is not properly before the Court").

3. Even had petitioner pressed its procedural arguments below and properly included them within the question presented, the Court should still decline to consider them. This Court has repeatedly reminded litigants that it is "'a court of review, not of first view.'" *Chaidez*, 568 U.S. at 357 n.16 (citation omitted); see, *e.g.*, *McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017). Yet not only was the rule's procedural validity unexamined below, we have been unable to locate any decision (at any level) resolving petitioner's procedural challenges. Petitioner accordingly asks this Court to be the very first to sift through the notice of proposed rulemaking and administrative record, without any guidance from lower courts or the usual benefit of the adversarial process. The Court should decline that request. See *Chaidez*, 568 U.S. at 357 n.16 (declining to consider petitioner's argument in part because "we cannot find any case in which a federal court has considered" it).

B. In Any Event, Petitioner's Procedural Attacks Are Meritless

If the Court considers these new contentions, it should reject them for multiple reasons.

1. As an initial matter, both procedural attacks are time-barred. Cf. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule.") (citing *JEM Broadcasting Co.* v. *FCC*, 22 F.3d 320, 324-326 (D.C. Cir. 1994)). At the latest, procedural challenges under the APA "must be brought within six years of the agency rulemaking." *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1077 (9th Cir. 2016); see also, *e.g.*, *Sai Kwan Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009); 28 U.S.C. 2401(a). The SEC promulgated its whistleblowing rule on June 13, 2011. Petitioner first challenged the rule's procedural validity more than

six years later, in its opening merits brief filed August 24, 2017. There is every reason not to reopen a stale administrative record after a rule has fairly governed regulated entities for over half a decade.

It is no matter that these attacks are not part of a standalone action under the APA. A party may "not 'do indirectly what it is forbidden by statute from doing directly'" and "seek[] a back door" to judicial review of the agency's procedures by asserting procedural invalidity as a defense. *JEM Broadcasting*, 22 F.3d at 324; see *id.* at 325-326. Petitioner should have (and could have) challenged the SEC's procedures earlier. Its failure to do so precludes its attacks now.

2. Regardless, each challenge fails on its merits.

a. Contrary to petitioner's assertion, the SEC's final rule *was* a "logical outgrowth" of the rulemaking notice. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007). "The object, in short, is one of fair notice." *Ibid.* A notice suffices if it provides the "substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b). Consistent with that modest requirement, "'[t]he notice need not specifically identify every precise proposal' that '"may ultimately [be] adopt[ed]."' *United Steelworkers of Am., AFL-CIO-CLC* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 317 (5th Cir. 1987) (citation omitted); accord *Am. Med. Ass'n* v. *United States*, 887 F.2d 760, 767-769 (7th Cir. 1989).

Parties do not have a right to comment "upon each application of the agency's announced rulemaking procedures, even if different applications may have significant consequences for the regulated industry," so long as the notice was "adequate." *Am. Coke & Coal Chems. Institute* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). Rather, an agency must undergo another round of notice-and-com-

ment only when "'the changes are so major that the original notice did not adequately frame the subjects for discussion.'" *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 631-632 (D.C. Cir. 1996) (citation omitted). Under these standards, courts have upheld final rules that effected "outright reversal of the agency's initial position; elimination of compliance options"; and "exempting certain entities from the overage of final rules." *Am. Med. Ass'n*, 887 F.2d at 767 (citing cases).

The SEC's notice readily described "the subjects and issues involved" (5 U.S.C. 553(b)) so that parties had fair notice the SEC would interpret Section 78u-6 as protecting internal whistleblowers. Petitioner's myopic reading of the notice ignores large swaths of the SEC's reasoning and requests for comment, and demands a level of specificity that Section 553(b) does not.

A primary focus of the rulemaking was how to promote internal reporting while still fulfilling the purposes of the whistleblowing statute. See, *e.g.*, 76 Fed. Reg. at 34,300-34,301. For instance, the notice specifically worried about "sufficient incentives for people to continue to utilize internal compliance processes" while requesting comments on "alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F." 75 Fed. Reg. at 70,495; see *id.* at 70,496 ("we also want to implement Section 21F in a way that encourages strong company compliance programs"; "we request comment on all aspects of

the intersection between Section 21F and established internal systems" of reporting).[17]

One obvious difficulty with balancing those goals is that an employee might fear retaliation if she reports internally—and accordingly would be less likely to do so. See, *e.g.*, 76 Fed. Reg. at 34,324 & n.217 (noting comments that internal reporting "[p]laces whistleblowers at risk of retaliation"). An obvious solution is to protect internal reporters from retaliation. That "outgrowth" was not merely "logical," but *necessary*. It would have been senseless for the SEC to go to such lengths to encourage internal reporting—exactly as so many comments vigorously recommended—only to undercut that objective by allowing companies to freely retaliate against internal reporters. The retaliation protections thus work hand-in-hand with promoting companies' internal-compliance programs, and parties easily could have "'anticipated'" this outcome. *Am. Coke*, 452 F.3d at 938; cf. *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("The instant notice left no doubt that EPA would consider all reasonable alternatives for cutting down vehicle use.").

The comments bear this out. See *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699 (D.C.

---

[17] See also, *e.g.*, *id.* at 70,491 ("Should the class of persons who are covered by this rule be narrowed or expanded?"), 70,493 (discouraging individuals from "circumvent[ing] or undermin[ing] the proper operation of the entity's internal processes for responding to violations of law"), 70,496 ("Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?"), 70,511 ("Should the application of the anti-retaliation provisions be limited or broadened in any other ways?"), 70,514 (noting concern about "effectiveness of internal compliance programs"), 70,490 n.10 (noting "inten[t] to facilitate the operation of company compliance processes, audits, and internal investigations").

Cir. 2008) (explaining that "the comments, statements and proposals made during the notice-and-comment period" can show that the final rule satisfies Section 553(b)). Commenters recognized this issue in urging the final rule to afford anti-retaliation protection to internal reporters. For example, the District of Columbia Bar explained that "expand[ing] the anti-retaliation protections to apply to internal programs" would "enhance the effectiveness" of those programs, and Section 78u-6(h)(1)(A)(iii) "allows the Commission to" do so. Comment Letter 4, D.C. Bar (Dec. 17, 2010).[18] Another comment likewise acknowledged the SEC's concern about effective internal-reporting programs, and argued that "[i]nternal and external whistleblowing should receive protection and encouragement." Comment Letter 4, National Whistleblower Center (Dec. 17, 2010).[19] And multiple corporations (including Microsoft, Merck, Procter & Gamble, and Hewlett-Packard) proposed that, consistent with their advocacy for internal-reporting requirements, "[a] whistleblower who submits a good-faith report through an internal compliance program * * * should be entitled to the protection of the anti-retaliation provisions of Section 21F, beginning at the time of submission." Comment Letter 13 (Dec. 17, 2010).[20] These comments show that the notice adequately apprised parties of "the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b).

---

[18] Available at https://www.sec.gov/comments/s7-33-10/s73310-146.pdf.

[19] Available at https://www.sec.gov/comments/s7-33-10/s73310-210.pdf.

[20] Available at https://www.sec.gov/comments/s7-33-10/s73310-150.pdf.

The SEC therefore had no obligation (or reason) to solicit more comments on the whistleblower definition, particularly given the congressional directive to promulgate rules "not later than 270 days after July 21, 2010." 15 U.S.C. 78u-7(a). "[T]he 'public interest in expedition and finality' in this case outweighed the advantages of additional comment." *Omnipoint*, 78 F.3d at 632. It is unsurprising that no court has had occasion to address this "logical outgrowth" objection—no party, until now, apparently considered the argument sufficiently viable to trot it out for decision.

b. Petitioner's contention that "the SEC did not adequately explain" its reasoning similarly ignores part of the SEC's discussion and the wider context of promoting internal reporting. This Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). As multiple commenters appreciated, one transparent way to remove a disincentive to internal reporting is to protect such reporting. As the SEC noted in a portion of the final rule elided by petitioner, Rule 21F-4 "create[s] a significant financial incentive for whistleblowers to report possible violations to internal compliance programs," and "[e]mployees who report internally in this manner will have anti-retaliation employment protection." 76 Fed. Reg. at 34,325 & n.223.

Together with the agency's sensible construction of ambiguous text and the plain connection between internal reporting and robust anti-retaliation protections, that "reasonable, albeit brief, explanation" satisfies this lenient standard. *Long Island Care*, 551 U.S. at 175; see also, *e.g.*, *Global Crossing Telecommc'ns, Inc.* v. *Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 63-64 (2007) (concluding

that the administrative decision's "history" and "context" made "the FCC's rationale obvious").[21]

c. In addition, the APA mandates that, in considering these challenges, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki* v. *Sanders*, 556 U.S. 396, 409 (2009). Yet petitioner has not even attempted to make that showing. Indeed, remand here would be pointless. All petitioner's arguments attacking the SEC's interpretation of Section 78u-6 have been well-vetted for years, and the SEC has firmly disagreed. "As Judge Friendly explained, reversal and remand is 'necessary only when the reviewing court concluded that there is a significant chance that but for the error the agency might have reached a different result.'" *Envirocare of Utah, Inc.* v. *Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999). It is inconceivable that if the Court were to vacate the rule and remand for another round of comments, the SEC would reverse course.

C. The SEC's Two Independent Clarifications Of Section 78u-6 Warrant *Chevron* Deference With Or Without Notice-And-Comment Procedures

Even if petitioner is correct that the notice-and-comment process was defective, that would not strip the SEC's interpretation of *Chevron* deference. Both Rule 21F-2 and the subsequent 2015 interpretative guidance are valid interpretative rules entitled to *Chevron* deference without *any* notice-and-comment process.

---

[21] As noted above, the D.C. Bar, in a comment cited multiple times throughout the final rule, explicitly identified Subdivision (iii) as providing authority for the SEC to protect internal reporters.

1. The SEC did not need to use notice-and-comment procedures merely to construe Section 78u-6, because interpretive rules are exempt from those requirements. See 5 U.S.C. 553(b)(A). "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted). The rule "must 'derive a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document.'" *Cent. Tex. Tel. Co-op, Inc.* v. *FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005). Although both interpretive and substantive rules may "alter[] primary conduct," *id.* at 214, "the crucial distinction" between the two "is that a substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*," *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997); see *id.* at 94 (even though an interpretive rule may represent, "in reality, a change in the legal norm," the agency is not "exercising authority to itself make positive law"); *Miller* v. *Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) ("A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules.").

Simply resolving a statutory ambiguity—as the SEC's authoritative interpretation of "whistleblower" did here—represents a paradigmatic interpretive rule. See, *e.g.*, *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Miller*, 536 F.3d at 1033 ("the purpose of an interpretive rule" is to "clarif[y]" an ambiguous term); *Warder* v. *Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) (ambiguous "definitions created the need for clarification—precisely the

function of an interpretative rule"). Petitioner's procedural challenges are thus wholly beside the point.[22]

2. In any event, the SEC's subsequent 2015 interpretive guidance—itself a valid interpretive rule—warrants deference. *Chevron* "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002); see, *e.g.*, *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). Rather, multiple factors support applying the *Chevron* framework: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222.

The 2015 interpretive guidance checks all those boxes. Congress has expressly instructed the SEC to administer Dodd-Frank's intricate administrative scheme, and the SEC exercised that authority to clarify an ambiguity that impeded the effective functioning of that scheme. While petitioner obviously disagrees with the SEC's conclusion, it can hardly quibble that the SEC has carefully considered the matter. *Chevron* thus "provides 'the appropriate legal lens through which to view the legality of'" the SEC's 2015 guidance, despite the absence of notice-and-comment rulemaking. *Cal. Valley Miwork Tribe* v. *United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (quoting *Barnhart*, 535 U.S. at 222); see also, *e.g.*, *Kruse* v. *Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59-61 (2d Cir. 2004); *Schuetz* v. *Banc One Mortg. Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002).

---

[22] As discussed *infra*, this interpretive rule would warrant *Chevron* deference.

The SEC correctly read Congress's critical expansion of whistleblower protection in Dodd-Frank, and its formal rule should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEPHEN F. HENRY
2625 Alcatraz Avenue, No. 615
Berkeley, CA 94705

DANIEL L. GEYSER
Counsel of Record
STRIS & MAHER LLP
Three Energy Square
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(214) 396-6634
daniel.geyser@strismaher.com

PETER K. STRIS
BRENDAN S. MAHER
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

OCTOBER 2017